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August 18, 2010

**SETTLEMENT COMMUNICATION PURSUANT TO
FED. R. EVID. 408 & TEX. R. EVID 408**

Via 1st Class Mail and Email: capuyan.stephen@epa.gov

Stephen Capuyan MC 6SF
Enforcement Officer
USEPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733



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Re: Gerdau Ameristeel, response costs associated with May 26-27, 2008 scrap fire at 300 Ward Road, Midlothian, TX 76065-9646 (the Site); EPA # TXN000606881

Dear Mr. Capuyan:

On behalf of Gerdau Ameristeel (Gerdau), we are writing as a follow up to your letter of May 25, 2010, in which you enclosed a CD-ROM of contractor invoices and a fully executed Field Consent Order. Per our December 21, 2009 letter, Gerdau requested the contractor invoices to ensure that the costs for which EPA seeks reimbursement are related to the Site and eligible for reimbursement under Section 107(a) of CERCLA.

Gerdau is very appreciative of the involvement of EPA's On Scene Coordinator (OSC), Eric Delgado, in the scrap fire event on May 27, 2008. The OSC established a cooperative relationship with Gerdau, local responders and media representatives, and Gerdau was pleased to have an independent agency representative dealing with and answering questions posed by the media.

Background

The event in question is a scrap fire that lasted less than 24 hours in May 2008. EPA and the Start 3 team spent significant time at the plant beginning on the morning of May 27 until 1745 hrs on May 28 when the fire was abated and OSC released EPA's Start 3 from the site. Start 3 remobilized at the site for sampling on May 30 and June 16, 2008.

As Weston's September 4, 2008 Emergency Response Report documents, local fire departments and Gerdau and its contractors undertook the burden of the response actions, including using heavy equipment to separate burning scrap material; building berms to collect excess fire-fighting water; storing the fire-fighting water in frac tanks and recycling it for

ongoing fire-fighting activities; contracting with Talem to collect and analyze surface water samples per EPA's sampling protocol and under EPA oversight; contracting with CTEH to provide toxicological expertise and collect and analyze air samples with EPA oversight and approval of sampling locations and monitoring activities; recycling the burned scrap; and contracting with Titan to sample and analyze the containerized fire-fighting water with EPA oversight.

On December 7, 2009, EPA issued Gerdau a Request for Reimbursement of Costs in the amount of \$120,988. On December 21, 2009, on Gerdau's behalf, we asked EPA to provide all documents supporting the costs for which EPA seeks reimbursement. Mr. Spencer advised that the requested information would be available only in a certified cost package, which would cost Gerdau another \$30,000 or even \$35,000. On January 6, 2010, Mr. Spencer wrote that he had requested a Scorpions report and would provide that. We received the Scorpions report on January 6, 2010, but note that it is a bare-boned 13-page report with 5 blank pages, and provides no cost detail. We then met with EPA on February 9, 2010 to discuss the availability and cost of obtaining the requested records.

During our meeting with EPA representatives on February 9, 2010, we discussed Gerdau's position that EPA's response costs associated with non-storm water discharges from fire fighting activities are not recoverable under CERCLA because they were federally-permitted releases. We also gave EPA a copy of Gerdau's TPDES permit that authorizes discharges from fire fighting activities.

By your letter dated May 25, we received a CD-ROM with the contractor's (Weston's) monthly invoices for June, July, September, October, November and December 2008. The CD-ROM did not include Weston's August 2008 invoice covering the period from July 26 through August 22, 2008. The monthly invoices vary in length from 1,388 pages to 1,772 pages, with only 9 to 16 pages of each not fully redacted. The only meaningful information provided were the "Technical Progress Report Gerdau Ameristeel SSID A6G09," that were part of Weston's June, July and September invoices. We would appreciate receiving a copy of the "Technical Progress Report Gerdau Ameristeel SSID A6G09" that should be part of Weston's August 2008 invoice.

The Discharges from Fire Fighting Activities Were Federally-Permitted Releases

Gerdau advised the OSC on May 27 that the discharge of water from fire fighting activities is federally-permitted. CERCLA section 107(j) does not authorize EPA's recovery of response costs or damages resulting from a federally-permitted release:

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally-permitted release shall be pursuant to existing law in lieu of this section. . . .

42 U.S.C. § 9607(j)(2009). Chaparral's TPDES General Permit (TXR050000), which is authorized by Section 402 of the federal Clean Water Act, provides as follows:

5. Non-Storm Water Discharges

Industrial facilities that qualify for coverage under this general permit may discharge the following non-storm water discharges through outfalls identified in the SWP3, according to the requirements of this general permit:

(a) discharges from fire fighting activities and uncontaminated fire hydrant flushings (excluding discharges of hyperchlorinated water, unless the water is first dechlorinated and discharges are not expected to adversely affect aquatic life)

TPDES General Permit No. TXR050000 Part II.A.5. As the water from fire fighting activities was discharging through "Outfall 002" identified on Gerdau's storm water pollution prevention plan (SWP3), that discharge was federally-permitted. The water from fire fighting activities was not commingled with process water, and the discharge met all applicable permit conditions. EPA may not, therefore, recover any costs associated with the water, including the costs associated with testing split samples of surface water and the contained waters in the frac tanks.

EPA's Costs Associated with Water Discharges are Divisible from the Costs Associated with Air Emissions

EPA's incurred costs fall into two categories: (1) costs associated with air emissions from the fire and (2) costs associated with federally-permitted water discharges. Our review of the EPA's reports and invoices indicates that costs associated with federally-permitted water discharge are reasonably divisible from the costs associated with air emissions.

Of the laboratory costs included in the Weston invoice, \$14,863 (89% of total testing costs) was spent on water testing (Test America and Columbia Analytical) and \$1,633 was spent on non-water testing (Accutest). The \$14,863 in direct costs and the related share of indirect costs should be deleted from the total contractor's charges because those costs are associated with a federally-permitted release. Start 3 participated in water sampling on May 25, May 30, and June 16. Approximately thirty-one percent of the eight-page Emergency Response Report and thirty percent of the Weston employee logs are devoted to water. Thus, response costs are reasonably divisible, by first deleting \$14,863 and related indirect costs and then deleting thirty percent of the remaining costs.

We also note that all of the laboratory costs EPA incurred were to run analyses on samples that EPA split with Gerdau. EPA chose sampling locations and observed the sampling and chain of custody procedures. It is unreasonable for EPA to require Gerdau to pay twice for the same analysis of the same material for EPA's convenience. EPA chose to rely on Gerdau's air/toxicology contractor's data and could also have relied on Gerdau's water analyses.

In July 2008, the OSC asked Weston to obtain a copy of Gerdau's storm water discharge permit, ostensibly to review Gerdau's claim that the water discharges were federally-permitted. Costs associated with this task are not subject to cost recovery under CERCLA.

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Because EPA required Gerdau to incur over \$250,000 of unnecessary costs managing water it was federally-authorized to discharge, equity requires further reductions in EPA's cost recovery.

Although Gerdau advised the OSC that the water discharges were federally-authorized, Gerdau complied with the OSC's order to recover the fire fighting water from Gerdau's storm water system. To that end, Gerdau's contractors constructed berms in the storm water conveyance to capture the water, with the farthest berm located 600 yards downstream of Highway 67, but still on Gerdau's property. Gerdau removed the water from the conveyance, stored it in rented containers (frac tanks), tested it, and ultimately beneficially reused it in its production process. Gerdau incurred costs of more than two hundred and fifty thousand dollars (\$250,000) to capture, remove and store water that Gerdau was legally authorized to discharge. Thus, these were wholly unnecessary costs. Gerdau's impression was that the OSC either did not believe that the discharge was authorized, or did not consider it pertinent. On an equitable basis, EPA's response costs should be offset fully by the unnecessary response costs that Gerdau was required to incur.

Finally, we note that Weston completed its work in November 2008, with the interim Report being finished on September 4, working only 8.5 hours in October, and working only 4 hours in November. Because work ceased in November 2008, we believe EPA is unjustified in recovering any indirect costs after November 2008.

Proposal

Gerdau is eager to expeditiously resolve EPA's Request for Reimbursement of Costs. Taking into consideration the divisibility of costs related to federally-permitted water discharges and the equitable factors discussed above, but in the interests of avoiding costs associated with future negotiations and putting this item to rest, we propose settlement based upon Gerdau's payment of fifty percent (50%) of EPA's requested reimbursement (*i.e.*, \$60,494).

Please don't hesitate to contact me if you have any questions regarding this proposal.

Sincerely,



Becky Jolin

cc: Anne Foster foster.anne@epa.gov